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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 723

ESTATE OF LENA R. ARENTS, UNITED STATES TRUST COMPANY OF NEW YORK, Sole Surviving Executor,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	2-6
Statement of the Case	6-8
Jurisdiction of the Court of First Instance	8
Reasons for Granting the Writ	8
I The Court of Appeals below has rendered a decision in conflict with a decision of the Court of Appeals for the Fifth Circuit on the same matter	9
II The Court of Appeals below has decided an important question of federal law which has not been, but should be settled by this Court	10
Last Point	37
Appendix	
Judgment of the Court of Appeals	A-1

CITATIONS

Cases

Burnet v. Northern Trust Company (1931) 283 U. S. 782 ..... 14, 15

Commissioner v. Estate of Church (1949) 335 U. S. 632 ..... 14, 22-33

PAGE

Commissioner v. Nathan's Estate (1947, C. C. A. 7) 159 F. 2d 546, reversing 6 T. C. 604; certiorari denied 334 U. S. 843 22

Curie, Estate of Charles (1945) 4 T. C. 1175 22

F. H. A. v. The Darlington, Inc. (1958) 358 U. S. 84 32

Great Northern Ry. Co. v. U. S. (1942) 315 U. S. 262 32

Hassett v. Welch (1938) 303 U. S. 303 ..... 20, 34, 35

Helvering v. Hallock (1940) 309 U. S. 106 ..... 14, 22

Hubbard, Estate of Debe W., v. Commissioner (1957, C. A. 5) 250 F. 2d 492, reversing in part 26 T. C. 183 9

McCaughn v. Carnill (1930, C. C. A. 3) 43 F. 2d 69, certiorari denied 283 U. S. 825 14

McCormick v. Burnet (1931) 283 U. S. 784 15

Marks v. Higgins (1954, C. A. 2) 213 F. 2d 884 22

May v. Heiner (1930) 281 U. S. 238 ..... 14, 15, 28-30

Morsman v. Burnet (1931) 283 U. S. 783 15

Spiegel, Estate of, v. Commissioner (1949) 335 U. S. 701 23

United States v. Freeman (1845) 3 How. (U. S.) 556 32

STATUTES

Revenue Act of 1926, Public Law 20, 69th Congress, c. 27, 44 Stat. 9, 70:

Section 302 (c) 13

Joint Resolution of March 3, 1931, Public Law 131, 71st Congress, c. 454, 46 Stat. 1516 15-16

Page

Revenue Act of 1932, Public Law 154, 72nd Congress, c. 209, 47 Stat. 169, 279:
Section 803 18

Internal Revenue Code of 1939, 76th Congress, 53 Stat., Part 1:
Section 811 (c)(1)(B) 3, 11

Technical Changes Act of 1949, Public Law 378, 81st Congress, c. 720, 63 Stat. 891 ..... 3, 12, 23, 36

Revenue Act of 1951, Public Law 183, 82nd Congress, 65 Stat. 452:
Section 608 26

Technical Changes Act of 1953, Public Law 287, 83rd Congress, c. 512, 67 Stat. 617 ..... 3, 26-7

Internal Revenue Code of 1954, Public Law 591, 83rd Congress, 68 A Stat. 1:
Section 2036 ..... 42, 27

REGULATIONS:

Regulations 80 (1934 Edition):
Article 18 20

Regulations 80 (1937 Edition):
Article 18 21

Regulations 105:
Section 81.18 5-6

Regulations as to estate tax under 1954 Internal Revenue Code, T. D. 6296, 1958-2 C. B. 433:
Section 20.2036-1 ..... 27, 36

Treasury Decisions

No.	Page
4336, XI-1 C. B. 329	11
4729, 1937-1 C. B. 284	14, 20
4868, 1938-2 C. B. 355	12, 21
5834, 1951-1 C. B. 72	5, 35
6073, 1954-2 C. B. 280	27
6296, 1958-2 C. B. 433	27

Congressional and Committee Hearings and Reports

Appointments to Committee on Ways and Means and Committee on Finance (71st Congress) 74 Congressional Record, Part 1, pages 47-8, 246 32

Congressional Statements as to Joint Resolution of March 3, 1931 (71st Congress, 3rd Session) 74 Congressional Record, Part 7, pages 7078, 7498-9 ..... 15, 16, 17

Appointments to Committee on Ways and Means and Committee on Finance (72nd Congress) 75 Congressional Record, pages 13, 255, 440 32

Hearings before the Committee on Ways and Means on Revenue Revision, 1932, 72nd Congress, First Session 18

Report No. 708 of the Committee on Ways and Means on Section 803 of Revenue Act of 1932; 1939-1 C. B. (Part 2) page 490 18-19

PAGE

Hearings before the Committee on Finance on the Revenue Act of 1932, 72nd Congress, First Session 18

Report No. 665 of the Committee on Finance on Section 803 of the Revenue Act of 1932, 1939-1 C. B. (Part 2) page 532 18-19

Congressional Statements as to Revenue Act of 1932, 75 Congressional Record, pages 5461, 7348, 10,085-10,099, 11,666 19

Report of the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, 73rd Congress, Vol. II—Part 2, page 147, et seq. 19

Report of Committee on Finance to Accompany H. R. 5268, 81st Congress, First Session, 1949-2 C. B. 293-5 23

Report of Conference Committee on H. R. 5268, 81st Congress, First Session, 1949-2 C. B. 295-301 24-26

Congressional Statements as to Technical Changes Act of 1949, 95 Congressional Record (1949) Part 10, pages 12,988-12,991 24-26

Congressional Statements as to Technical Changes Act of 1949, 95 Congressional Record, Part 11, pages 14,410-12 and 14,443-8 ..... 17, 26

Report of the Committee on Finance on the Technical Changes Act of 1953, 1952-2 C. B. 530-1 27

Report of the Committee on Ways and Means on Technical Changes Act of 1953, Section 207, 1953-2 C. B. 513 27

PAGE

Report of the Committee on Finance on Internal Revenue Code of 1954, 83rd Congress, 2nd Session, Report No. 1622 27

MISCELLANEOUS

The Church and Spiegel Decisions and the Technical Changes Act of 1949, by Charles Looker, 8th New York University Institute on Federal Taxation (1950) 37

Federal Income, Gift and Estate Taxation, by Rabkin & Johnson, §36.07 37

Fownes and Kramer, *Federal Estate and Gift Taxes* 37

Inter Vivos Transfers and the Federal Estate Tax, by Surrey and Aronson, 32 Columbia Law Review 1332 at 1352 (1932) 33

Sutherland, *Statutes and Statutory Construction* (3rd Edition by Horack) §§1930 and 4510 ... 33

Transfers in Trust under the New Estate Tax Law, by James B. Lewis, 3 American University Tax Institute Lectures (1949) 36

E. T. 5, XIII-2 C. B. 369 (1934) 20

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner United States Trust Company of New York as sole surviving executor* of the last will and testament of Lena R. Arents respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Second Circuit which reversed a decision of the United States

* George Arents, the co-executor, died on December 13, 1960, while the case was pending in the Court of Appeals.

Tax Court, and in support thereof your petitioner respectfully says:

Opinions Below

The opinion of the Tax Court is reported at 34 T.C. 274, and a copy was included in the Appendix below (see Transcript, pp. 22-51).

The opinion of the Court of Appeals which reversed the decision of the Tax Court was filed on January 5, 1962 but has not yet been reported except in C.C.H. Federal Estate and Gift Tax Service ¶12,054 and in P. H. Federal Estate and Gift Tax Service ¶145,807. A copy of the opinion is annexed to the original Transcript of the record and to each of the nine copies thereof filed herewith (pp. 55-65).

Jurisdiction

The grounds on which the jurisdiction of this Court is invoked are:

(i) The date of the judgment sought to be reviewed and the time of the entry of said judgment is January 5, 1962. A copy is annexed hereto as Appendix 1;

(ii) No motion for a rehearing was made. The time to file a petition for a writ of certiorari has not been extended;

(iii) The statutory provision which the petitioner believes confers jurisdiction on the Supreme Court to review the said judgment by writ of certiorari is Title 28 U.S.C. § 1254(1); c. 646, 62 Stat. 928.

Question Presented

The following question is presented for review:

Whether under Section 811(c)(1)(B) of the Internal Revenue Code of 1939 as amended there is includible for estate tax purposes in the taxable estate of a decedent who died on March 11, 1954 the value of the property irrevocably transferred in trust by the decedent after March 3, 1931 and before June 7, 1932 under which the decedent retained the right to income after the death of another person who in fact survived the decedent.

Statutes and Regulations Involved

Section 811(c)(1)(B) of the Internal Revenue Code of 1939 (Title 26 U.S.C. §811(c)(1)(B)), as amended by Section 7(a) of the Technical Changes Act of 1949 (c. 720, 63 Stat. 891) and by Section 207 of the Technical Changes Act of 1953 (c. 512, 67 Stat. 615):

> "§ 811. *Gross Estate.* The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * *
>
> (c) Transfers in Contemplation of, or Taking Effect at Death:
>
> (1) General rule: To the extent of any interest therein of which the decedent has at any time

made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) by trust or otherwise—

* * * *

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;

* * * *

Subparagraph (B) shall not apply to a transfer made before March 4, 1931 nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

* * * *"

Subparagraph (B) is divided into subsections (i) and (ii). The discussion in this brief will be confined to subsection (i) as the Commissioner does not rely on subsection (ii). The latter subsection applies only to the retention of rights over income (Regulations 105, Section 81.19). The decedent here had no such right to designate with respect to income.

At the date of death of the decedent (March 11, 1954) the regulations relating to subsection (i) of paragraph (1)(B) were embodied in Section 81.18 of

Regulations 105 as amended to conform to the Technical Changes Act of 1949 (*T.D.* 5834, 1951—1 C. B. 72) and to the Technical Changes Act of 1953 (*T. D.* 6073, 1954—2 C. B. 280) and provided as follows:

> "*Transfers with possession or enjoyment retained.* Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, section 811(c)(1)(B) requires the inclusion in the gross estate of the value of all property transferred by the decedent, whether in trust or otherwise, if the decedent retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property (1) for his life; or (2) for any period not ascertainable without reference to his death; or (3) for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period.
>
> "Property shall not be included in the gross estate under this section unless transferred—
>
> (1) after March 3, 1931, and before June 7, 1932, and the retention or reservation by the decedent was (A) for his life or (B) for such a period as to evidence his intention that it should extend at least for the duration of his life, and his death occurs before the expiration of such period; or
>
> (2) on or after June 7, 1932.
>
> "A reservation for a 'period not ascertainable without reference to his death' may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the

last quarterly payment and the decedent's death was to be received by him or his estate. This expression also includes a reservation of the right to receive the income from transferred property after the death of another person who in fact survived the decedent; but in such a case the amount to be included in the gross estate under this section does not include the value of the outstanding income interest in such other person. However, if such other person predeceased the decedent, the reservation may be considered to be for the decedent's life or for such a period as to evidence his intention that it should extend at least for the duration of his life.

"The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

"If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate."

Statement of the Case

On June 4, 1932 Lena R. Arents (hereafter referred to as the decedent) executed an irrevocable trust deed by which she conveyed to the trustee four insurance policies on the life of her husband and certain securities. The trustee was directed to receive the income from the securities and from any reinvestments, and

to apply the income first to pay the premiums on the insurance policies and to pay any excess income to the decedent during her life. The trustee was also directed to retain the insurance policies until the death of the husband, and it was given no power to surrender or otherwise dispose of the policies prior to that time unless the income available to pay the premiums was insufficient. In case her husband should die before the decedent, the trustee was directed to collect the proceeds of the policies, to invest the proceeds, and to pay the income therefrom to the decedent. In case decedent should die before her husband, he was to receive the income of the trust during his life. On the death of the survivor, the principal was distributable to their son (Tr., pp. 8-20).

During the trust term the income from the securities was more than three times the amount of the premiums. Of the income 28.93% was used by the trustee to pay the premiums, and the balance of 71.07% of the income was paid by the trustee to the decedent or held for her account at her death (Tr., p. 6).

The decedent died on March 11, 1954, leaving her husband surviving. The trustee then still held the four insurance policies. In the Federal estate tax return the executors reported as taxable 71.07% of the securities held in the trust at the date of death, being the proportion as stated of the securities from which the decedent had received income. The executors claimed in their return that the insurance policies and the 28.93% of the securities which had been required to produce income for payment of the premiums were not subject to estate tax (Tr., pp. 4-7).

On the audit of the return the Commissioner determined that the value of all the property in the trust fund is includible in the taxable estate. On a petition for a redetermination the Tax Court sustained the position of the executors in an opinion which was reviewed by the entire Court and in which eleven of the fourteen Judges participating concurred (Tr., pp. 22-51). On a petition for review the Court of Appeals for the Second Circuit reversed the decision of the Tax Court, thereby reinstating the determination made by the Commissioner (Tr., pp. 55-65).

Jurisdiction of the Court of First Instance

The United States Tax Court was the Court of first instance. That Court had jurisdiction to redetermine estate tax assessments made by the Commissioner of Internal Revenue under Section 6214 of the Internal Revenue Code of 1954 (Title 26 U.S.C. § 6214). The petition of the executors to the Tax Court sought such a redetermination.

Reasons for Granting the Writ

The special and important reasons for granting a writ of certiorari are:

(1) The Court of Appeals below has rendered a decision in conflict with a decision of the Court of Appeals for the Fifth Circuit on the same matter.

(2) The Court of Appeals below has decided an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT

POINT I

The Court of Appeals below has rendered a decision in conflict with a decision of the Court of Appeals for the Fifth Circuit on the same matter.

In this case the Court of Appeals for the Second Circuit has held that by reason of the joint resolution of March 3, 1931 there is includible in the estate of a decedent, including one who died after the enactment of the Technical Changes Act of 1949, the value of property transferred in trust by the decedent between March 3, 1931 and June 7, 1932, reserving to the decedent the right to income from the trust after the death of another person even though the right to such income never matured because of the death of the decedent before the death of such other person. The Court of Appeals for the Fifth Circuit in *Estate of Hubbard v. Commissioner* (1957) 250 F.2d 492, determined that such a transfer was not so includible.

In his brief in the Court below the Commissioner said (p. 25):

> "On the other hand, recently the Fifth Circuit in *Estate of Hubbard v. Commissioner* 250 F.2d 492, ruled directly against the Commissioner's present contention."

In the last paragraph of its opinion, the Court below stated that its decision is in direct conflict with the decision of the Court of Appeals for the Fifth Circuit (Tr., p. 65).

POINT II

The Court of Appeals below has decided an important question of federal law which has not been, but should be, settled by this Court.

After the decedent irrevocably transferred the insurance policies on the life of her husband to the trustee on June 4, 1932, she had no further rights in the policies as such. Thereafter her only rights were those which she reserved under the trust deed. By it she directed the trustee to hold the policies, to pay the premiums out of the more than ample income from the securities in the trust, and if her husband should predecease her to collect the proceeds of the policies, invest such proceeds, and pay the income from such investments to the decedent for life. The trustee had no right to surrender the policies. Therefore, as to the insurance policies the decedent reserved only the contingent right to receive income from the proceeds of the policies after the death of her husband who in fact survived her.

The same situation existed with respect to the portion of the securities in the trust which were required to produce income to pay the premiums on the insurance policies. The trustee was required to pay the premiums as a first charge out of the income from such securities; the trustee had no power to sell or otherwise convert the insurance policies into income producing assets unless it should be without income to pay the premiums; and the income of the trust was over three times the amount required to pay the premiums. Here also the decedent reserved only the

right to the income from such securities after the death of her husband when the proceeds of the policies would be paid and no further premiums would be due. Therefore, as to such securities the decedent reserved only the contingent right to receive income therefrom after the death of her husband who in fact survived her.

The Court below has sustained the claim of the Commissioner that the insurance policies and securities in question are includible in the taxable estate of the decedent under Section 811(c)(1)(B)(i) of the Internal Revenue Code of 1939 as in effect at the date of death of the decedent. That section provided for the inclusion in the taxable estate of any property of which a decedent had at any time made a transfer by trust or otherwise under which he retained "the possession or enjoyment of, or the right to the income from, the property":

(a) for his life,* or

(b) for any period not ascertainable without reference to his death,* or

(c) for any period which does not in fact end before his death.**

* These two phrases have been used in all statutes since they were respectively adopted, and the same phrases have been used in all applicable regulations.

** This phrase has been used in all statutes since the Revenue Act of 1932 when it was adopted as a "clarifying change" from the phrase "for any period not ending before his death" which had been used in the joint resolution of March 3, 1931. In the regulations relating to the joint resolution, the statutory phrase was used (T. 18, 4336, XI-1 C.B. 326). However, after the 1932 amendment, the regulations used the phrase "for a period of such duration as to evidence its intention that it should extend to his death" (T. D. 4728, *post*), and in 1938 this was changed

However, the following exemption provision had been added to the section by the Technical Changes Act of 1949 and subsequent amendments:

> "Subparagraph (B) shall not apply to a transfer made before March 4, 1931 nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)."

As the trust involved here was made after March 3, 1931 and before June 7, 1932, the question at issue is whether the retention by the decedent of the contingent right to receive income from the trust after the death of her husband who in fact survived her requires the inclusion of the trust property in the decedent's gross estate under the joint resolution of March 3, 1931 as referred to in the provision quoted. The Tax Court and the Court of Appeals for the Fifth Circuit have held that the retention of such a contingent right does not require inclusion. The Court of Appeals below has held to the contrary.

The provision last quoted above was originally inserted in the Internal Revenue Code of 1939 and was made applicable only to the estates of decedents dying after February 10, 1939 and before August 16, 1954. However an identical provision was included in Section 2036 of the Internal Revenue Code of 1954 ap-

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to read "for such a period as to evidence his intention that it should extend at least for the duration of his life, and his death occurs before the expiration of such period." T. D. 4868, *post*. This last-quoted phrase has been used since 1918 and is in Section 81.18 of Regulations 105 applicable to this case. p. 5.

plicable to the estates of decedents dying after August 16, 1954. Therefore, the question here involved will arise in the estate of every decedent who has died since February 10, 1939 or who shall hereafter die having made a transfer in trust between March 3, 1931 and June 7, 1932 with reservation of a contingent income interest of the kind involved herein. Accordingly, the question is an important one of federal law which has not been, but should be, settled by this Court.

This question, which the petitioner believes to have been erroneously decided by the Court below, involves the complicated legislative and judicial history of the statute. That history follows:

History of Section 811(c)(1)(E)

Section 302(c) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 70), which is the predecessor of Section 811(c), provided that there should be included in the taxable estate of a decedent any property transferred by him in contemplation of death or by transfer "intended to take effect in possession or enjoyment at or after his death". Many cases arose involving different theories for interpreting the statute. On one side it was argued that the statute should be interpreted in accordance with "formal distinctions" pertaining to the law of real property", "the refined technicalities of the law of property", "the recondite learning of ancient property law" and "the niceties of the art of conveyancing". On the other side it was argued that the statute should be interpreted in accordance with the "plain purposes of a modern

fiscal measure", and that Courts should "look to substance, not to form". This battle of theories is recounted in *Helvering* v. *Hallock* (1939) 309 U.S. 106, and in *Commissioner* v. *Estate of Church* (1948) 335 U.S. 632.

The first major skirmish occurred in *May* v. *Heiner*, 281 U.S. 238, which was decided on April 14, 1930. The trust there involved provided for payment of income to decedent's husband during his life and after his death to the decedent during her life with remainder over to their children. This Court there upheld the "law of property" theory, determining that the trust was not taxable because "title thereto had been definitely fixed by the trust deed". The Court said:

> "The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event."

That case involved the unusual situation of a secondary life estate which would not result in any substantial tax loss. Therefore, it did not apparently worry the Treasury Department, and there was no request for amendatory legislation. Thereafter the Commissioner took the position that the decision did not apply to a trust where the decedent had reserved the income for his own life. See, for example, *McCaughn* v. *Carnill* (August 13, 1930, C.C.A. 3) 43 F.2d 69, certiorari denied 283 U.S. 825, and also the brief on petition for writ of certiorari in *Burnet* v. *Northern Trust Company*, 283 U.S. 782. However,

on March 2, 1931 this Court filed its *per curiam* opinions in *Burnet* v. *Northern Trust Company*, supra, *Morsman* v. *Burnet*, 283 U.S. 783, and *McCormick* v. *Burnet*, 283 U.S. 784. The first two cases involved trusts where the decedent had reserved the income for his own life, and the third case involved a trust where the decedent had reserved the right to designate who should receive the income of the trust. This Court held that none of the trusts was taxable under Section 302(c).

These decisions brought immediate action by the Treasury Department. On the following morning, March 3, 1931, Acting Secretary of the Treasury Ogden Mills wrote a letter to the Speaker of the House referring to *May* v. *Heiner*, *Burnet* v. *Northern Trust Company* and *McCormick* v. *Burnet*. He did not mention the *Morsman* case, possibly because it was similar to the *Northern Trust Company* case. He stated that it was desirable to tax the type of transfer in those cases, and he enclosed a proposed amendatory statute. 74 Cong. Record, Part 7, (71st Congress, 3rd Session) pages 7198-9.* On the afternoon of the same day Chairman Hawley of the Committee on Ways and Means presented to the House a proposed joint resolution as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:
>
> "(c) To the extent of any interest therein of which the decedent has at any time made

* This letter is quoted in the opinion of the Court below. See transcript pp. 60-61

a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth." (The words in italics were those to be added.)

In explanation of this suggested amendment, Chairman Hawley said (page 7198):

"Mr. Speaker and gentlemen, the Supreme Court yesterday handed down a decision to the effect that if a person creates a trust of his property and provides that, during his lifetime, he shall enjoy the benefits of it, and when it is distributed after his death it goes to his heirs—the Supreme Court held that it goes to his heirs free of any estate tax.

"This resolution is to provide that hereafter such shall not be the law. * * *

* * * * * *

"Yesterday afternoon the Supreme Court of the United States handed down decisions in three cases—*Burnet* against *Northern Trust Co.*, *Morsman* against *Burnet*, and *McCormick* against *Burnet*—in which the court held that where an owner of property had made a transfer in trust reserving the income of the property or the right to dispose of the income therefrom, to himself

for his life with remainder to others after his death, the value of the property should not be included in the estate of the donor for purpose of Federal estate tax upon his death."

Congressman Garner said that the Committee on Ways and Means had held a meeting on the resolution and unanimously reported it. The resolution was adopted by the House.

On the same afternoon the resolution was presented to the Senate by Senator Smoot who said that every member of the Finance Committee had approved it. His explanatory statement was word for word like that of Congressman Hawley, indicating that both were reading a previously agreed statement. (page 7078). The resolution was adopted by the Senate and signed by the President on the same day. (c. 454, 46 Stat. 1516).

The Congressional Record does not indicate whether the resolution presented by Chairman Hawley was the same as the one proposed by the Treasury Department, or whether the Committee of either House at the meetings held that day to discuss the resolution had changed the Treasury's draft. Congressman Garner did say that the resolution had not been made retroactive (page 7199), and when discussing the proposed Technical Changes Act in 1949 Senator George who was a member of the Senate Finance Committee on March 3, 1931, suggested that the Treasury had tried at that time to induce Congress to make the resolution apply retroactively (95 Cong. Rec. 14,130). There are no published minutes of any Committee hearings relating to the joint resolution, nor is there any published report of any Committee. However, it is important to note that both in the House and in the

Senate the members were advised that the joint resolution was intended to change the law relating to a trust where the decedent had reserved the income to himself for life.

Section 302(*e*) was further amended and superseded by Section 803 of the Revenue Act of 1932 (c. 209, 47 Stat. 169, 279) so as to tax any transfer where the decedent had reserved income "for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death * * *." Neither the *Hearings before the Committee on Ways and Means on Revenue Revision*, 1932, 72nd Congress, First Session, nor the *Hearings before the Committee on Finance on the Revenue Act of 1932*, 72nd Congress, First Session, contains any reference to this proposed change. However, the purpose of the amendment is explained in identical language in the *Report of Committee on Ways and Means* on Section 803 of Revenue Act of 1932, 1939-1 C. B. (Part 2) p. 490 and the *Report of Senate Finance Committee*, id. p. 532, where both state:

> "The purpose of this amendment to section 302 (*e*) of the Revenue Act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect.

The changes are:

(1) The insertion of the words 'or for any period not ascertainable without reference to his death,' is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

(2) The insertion of the words 'or for any period which does not in fact end before his death,' which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

* * * *

These reports were submitted to the House and to the Senate and were adopted (75 Cong. Rec. 5461, 7348, 10,085-10,099, 11,666). They give the first clear evidence of what Congress intended by the joint resolution and by the subsequent amendment in the Revenue Act of 1932.

To the same effect see the *Report of the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes*, 73rd Congr., Vol. II—Part 2, at p. 117 *et seq.*

Although both the language of the 1932 amendment and the above quoted statement in the Committee reports would seem to apply to a trust where the decedent reserves the income after the death of another person *and such other person survives him*, the Commissioner issued a ruling *E. T.* 5, XIII—2 C. B. 369 in 1934 that a trust from which the decedent reserved the income after the death of another person was not taxable under either the joint resolution of 1931 or the amendment contained in the Revenue Act of 1932 unless the decedent should survive such other person. He said:

> "In other words, if the transferor was at the date of his death in the actual enjoyment of the income of the trust, the transfer should be subjected to tax; and, where the transferor's contingent right to the trust income was obliterated by his death prior to that of the life tenant, the transfer is not taxable."

However, it appears that he subsequently had some doubts as to the correctness of that ruling because in 1937 he amended Article 18 of Regulations 80, 1934 Edition, to provide that a transfer by a decedent for life, or for a period not ascertainable without reference to his death, or for a period of such duration as to evidence an intention that it should extend to his death, should include "the reservation or retention of the use, possession, rents, or other income, the actual enjoyment of which was to await the termination of a transferred precedent interest or estate." *T. D.* 4729, 1937—1 C. B. 284.

Subsequently in 1938 this Court in *Hassett* v. *Welch*, 303 U. S. 303, held that neither the joint resolution of 1931 nor the amendment contained in the 1932

Revenue Act could be applied retroactively to trusts created prior to the enactment of said statutes. In order to conform Article 18 of Regulations 80, 1937 Edition, to said decision, the Commissioner by *T. D.* 4868, 1938—2 C. B. 355, amended Article 18 to provide that a transfer was taxable if made:

> "(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or
>
> (2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.
>
> A reservation for a 'period not ascertainable without reference to his death' may be illustrated by * * * a reservation of a life estate following a precedent estate for life or a term of years."

Here was clear recognition by the Commissioner as early as 1938 that a trust reserving a life estate following a precedent estate was not taxable if it was created before June 6, 1932.

In 1939 the provisions of the Revenue Act of 1926 as amended relating to estate tax were incorporated in the Internal Revenue Code of 1939. Section 803 of the Revenue Act became Section 811 of the Code without change. In 1942 Regulations 80 were superseded by Regulations 105, and Article 18 became Section 81.18.

Although the Commissioner apparently changed his opinion with respect to the taxability of a trust created

after June 6, 1932 in which the decedent had reserved a life interest after the death of another person who survived him, the Courts have been unable to agree on the question. The Tax Court in *Estate of Charles Curie* (1945) 4 T. C. 1175 (appeal taken by the Commissioner and subsequently withdrawn) held that such a trust created in 1935 by a decedent who died in 1936 while E. T. 5 was in force was not taxable. Thereafter in *Commissioner* v. *Nathan's Estate* (1947, C. C. A. 7) 159 F. 2d 546, reversing 6 T. C. 604, certiorari denied 334 U. S. 843, the Circuit Court held that such a trust created in 1941 after E. T. 5 had been superseded was taxable. A similar determination was made in *Marks* v. *Higgins* (1954, C. A. 2) 213 F. 2d 884, affirming 45 A. F. T. R. 1300, involving a similar trust created in 1935 by a decedent who died in 1939. Whatever may be the law with respect to such a trust created after June 6, 1932, there was never a decision or a ruling prior to the decision of the Court below that such a trust created before that date is subject to tax.

The dispute over the meaning of these statutes lost its importance as a result of this Court's decision in *Helvering* v. *Hallock*, *supra*, holding that a trust in which the decedent had a contingent reversionary interest was taxable under the provision of Section 811 (c) as a transfer "intended to take effect in possession or enjoyment at or after death." Thereafter, most litigation concerning the taxability of trusts involved the question whether the *Hallock* decision applied to a reversion by operation of law and to a reversion the value of which was infinitesimal. That litigation culminated in the two decisions rendered by this Court on January 17, 1949 in *Commissioner*

of Internal Revenue v. *Estate of Church, supra*, and *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701.

The *Church* case involved a trust created in 1924 by which the decedent reserved the income for life, and this Court held that the trust was taxable. It had the alternative of basing this decision either upon an overruling of *May* v. *Heiner* by a determination that such a trust was "intended to take effect in possession or enjoyment at or after death," as those words were used in the Revenue Act of 1924 when the trust was created, or an overruling of *Hassett* v. *Welch*, supra, by a determination that the joint resolution of 1931 could be applied to trusts created prior to its enactment. This Court chose the former course and overruled *May* v. *Heiner*.

In the *Spiegel* case this Court held that a trust created in 1920 in which the decedent had a remote possibility of reverter by operation of law was also taxable under the "possession or enjoyment" provision.

These two decisions produced an immediate storm of protest both in and out of Congress, and a bill was shortly introduced as H. R. 7378 for the "Removal of Certain Inequities and Hardships in the Tax Laws" by superseding both decisions. *Report of Committee on Finance to accompany H. R. 5626*, 81st Congress, First Session, 1949—2 C. B. 293-5. This bill was subsequently enacted as the Technical Changes Act of 1949 (Public Law 378; c. 720, 63 Stat. 891). Section 7 thereof was designed to supersede the *Church* case, and Section 8 thereof to supersede the *Spiegel* case. There are no published minutes of Committee hearings on the bill, but the purpose thereof is clearly set

forth in statements made in Congress and the reports of the Congressional committees.

H. R. 5268 first came before the Senate on September 16, 1949 (95 Cong. Record, Part 10, pages 12,988-12,991). On the floor the bill was amended to add the following to Section 811 (c) (1) (B) of the Code:

> "(3) Exception in the case of transfers after March 3, 1931, and prior to June 7, 1932: Property transferred after March 3, 1931, and prior to June 7, 1932 shall not be included in the gross estate under this subsection by reason of the fact that the decedent retained any of the rights described in the amendatory language in Section 803 (a) of the Revenue Act of 1932 unless such property is includible by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)."

The bill was then sent to a Conference Committee, and the "Statement of the Managers" which accompanied the report of that Committee has extensive explanations of the purposes of Sections 7 and 8 of the bill. So far as here relevant, it was stated (95 Cong. Record, pages 14,443-6; 1949 - 2 C. B. 295-300):

> "Amendment No. 6 provides that property so transferred before June 7, 1932, shall not be included in the transferor's gross estate for estate-tax purposes by reason of the fact that he retained a life estate or similar rights in the income from the property unless the transfer was made after March 3, 1931, and before June 7, 1932, and is includible in his gross estate by reason

of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

* * * * *

"In order to effectuate the changes made by the conference amendments such amendments subdivide section 811 (c) of the Code into three paragraphs. Paragraph (1) merely states the existing rule that transferred property is includible in the decedent's gross estate if made (A) in contemplation of death, (B) with reservation of an income interest, or (C) if intended to take effect in possession or enjoyment at or after his death. * * *

* * * * *

"The income interests described by section 811 (c) (1) (B) and by similar language elsewhere in the conference amendments include reserved rights to the income from transferred property and rights to possess or enjoy non-income-producing property. Such interests also include a reserved power to designate the persons who shall, during the decedent's life or during any lesser period described in section 811 (c) (1) (B), receive the income from transferred property or who shall, during any such period, possess or enjoy non-income-producing property. Such interests do not, however, include powers over the transferred property itself not affecting the enjoyment of the income during the decedent's life. The expression 'not ascertainable without reference to his death' as used in section 811 (c) (1) (B) and elsewhere in the conference amendments includes the right to receive the income from transferred property after the death of another person who in fact survived the transferor; but

in such case the amount to be included under section 811 (c) (1) (B) in the transferor's gross estate does not include the value of the outstanding income interest in such other person."

The Report of the Conference Committee and the Statement of the Managers were read, discussed and agreed to in both the Senate and the House on October 13, 1949. 95 Cong. Record, Part 11, pages 14,410-2 and 14,443-8. The bill was signed by the President on October 25, 1949.

So far as here material, the Technical Changes Act of 1949 amended Section 811 (c) (1) of the Revenue Act of 1939 by providing that in the case of a decedent dying before January 1, 1950 (changed to January 1, 1951, by Section 608 of the Revenue Act of 1951, 65 Stat. 452), the provisions of subparagraph (B) should not apply to a "transfer made after March 3, 1931 and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931."

Section 811 (c) (1) was further amended by Section 207 of the Technical Changes Act of 1953 (Public Law 287, c. 512, 67 Stat. 615) by adding at the end thereof the following provisions:

"Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516)."

The result of said amendment was to make the provision contained in the Technical Changes Act of 1949 applicable to the estates of all persons dying after February 10, 1939. See *Report of Committee on Ways and Means on Technical Changes Act of 1953, Section 207*, 1953—2 C. B. 513, and also the *Report of the Finance Committee* on the same subject at pages 530-1. By *T. D.* 6073 the Commissioner amended Regulations 105 to conform to the changes made by said Act. 1954—2 C. B. 280. The said statute and Section 81.18 of the Regulations as so amended were in effect at the date of death of the decedent and are quoted in full at pages 3-6 hereof.

A provision which corresponds, except for clerical changes, to Section 811 (c) (1) (B) of the Internal Revenue Code of 1939 was included as Section 2036 of the Internal Revenue Code of 1954 applicable to the estates of decedents dying after August 16, 1954 (*Report of Committee on Finance on Internal Revenue Code of 1954*, 83rd Congress, 2d Session, Report No. 1622). Regulations applicable to Section 2036 have been adopted as Section 20.2036-1 (T. D. 6296; 1958—2 C. B. 423, 429-30), which is substantially the same as Section 81.18 of the prior Regulations 105.

Conclusion from History of Section 811(c)(1)(B)

An analysis of this complex legislative and judicial history leads inevitably to one conclusion. Under the express terms of Section 811(c)(1)(B) a trust created between March 3, 1931 and June 7, 1932 is not includible in the taxable estate unless it would have been includible under the joint resolution of March 3,

1931; and a trust reserving an income interest to the decedent after the death of another person who in fact survived the decedent was not includible in the taxable estate under the joint resolution.

In arriving at its decision that such a transfer was includible in the taxable estate under the joint resolution, the Court below proceeded upon a simple but erroneous assumption. In its opinion the Court said that since *May* v. *Heiner* involved such a contingent life estate and the Acting Secretary of the Treasury had referred to *May* v. *Heiner* in his letter of March 3, 1931, the joint resolution must have superseded that case and rendered taxable such a contingent life estate.

The fallacy of the Court's reasoning lies in regarding *May* v. *Heiner* as a case dealing with a contingent life estate. As shown above at page 13 the decision did not deal with any such problem but rather with a theory of taxation. Congress did not supersede *May* v. *Heiner*, but as this Court said in the *Hallock* case, 309 U. S. at 120 and the *Church* case, 335 U. S. at 648, Congress "discarded the *May* v. *Heiner* doctrine" which was the doctrine that taxation of transfers should depend upon legal title and not upon beneficial enjoyment. In fact the record in *May* v. *Heiner* does not disclose whether the case involved a contingent life estate, or one which was no longer contingent by reason of the prior death of the first life tenant. Also *May* v. *Heiner* has almost universally been referred to as a case dealing with the reservation of a life estate. See *Hassett* v. *Welsh*, 303 U. S. at 309, the *Hallock* case, 309 U. S. at 120, and the *Church* case, 335 U. S. at 636.

The conclusion of the Court below also ignores the material fact that when the joint resolution was presented to the House and to the Senate, *May* v. *Heiner* was not mentioned, and that Chairman Hawley of the Committee on Ways and Means and Chairman Smoot of the Senate Finance Committee each referred only to the three cases decided the previous day. Each chairman said that it was the desire of Congress to supersede those cases, and each said that Congress was dealing with a transfer by a decedent reserving the income "to himself for his life with remainder to others after his death". Accordingly, the assumption of the Court below that Congress intended to tax the reservation of a contingent life estate rests upon a false premise.

The Court below also said that disregarding legislative history—"absent any gloss on the statute"—the language of the resolution appears clearly to include a contingent life estate. This conclusion is based upon the insertion in the joint resolution of the provision as to the retention of an income interest for "any period not ending before his death". Apparently the Court below concedes that in such a case the decedent does not retain the income "for his life". Your petitioner contends that it does not appear "clearly" from the statute alone or from the legislative history that such a contingent interest is included within the other phrase quoted.

The determining factor here is the intention of Congress when it enacted the joint resolution. Congress was dealing with the cases decided the day before involving the reservation of primary life estates, and to render such interests taxable it provided

in the statute for taxation of income interests reserved "for his life". At the same time they had been advised of the decision in *May* v. *Heiner* involving a contingent income interest, but in his letter the Acting Secretary did not state whether the decedent had actually received any income from the property by reason of the prior death of the other person. It well may be that Congress was of the opinion that if in such a case the primary beneficiary should predecease the decedent, then at the decedent's death he would actually be receiving income benefits from the trust, and the transfer would be, in its substantial aspects analogous to the reservation of a life estate (see provision to that effect in the Regulations at page 6, supra), and should therefore be taxable. Thus, Congress may have inserted the phrase taxing a transfer with retained income "for any period not ending before his death" to cover that situation. That phrase is certainly susceptible to the construction that at some time after the transfer the decedent has enjoyed the income.

It is obvious that Congress intended by the joint resolution to include the retention of certain income interests as transfers "intended to take effect in possession or enjoyment at or after death". It is equally obvious that Congress did not intend by the joint resolution to include all income interests: it amended the statute in 1932 expressly for the purpose of including additional income interests, and by the exclusionary provision incorporated in the statute in 1949 Congress has definitely stated that there are certain income interests which were not includible under the joint resolution but which are includible under the 1932 amendments. Accordingly, the question involved

in the present case is whether a contingent life estate which never matured is one of the income interests which Congress intended to include by the joint resolution. The subsequent legislative history demonstrates that the inclusion of such income interests was not intended. The 1932 Committee Reports state that the amendments contained in the joint resolution "were adopted to render taxable a transfer under which the decedent reserved the income for his life."

The Court below concedes that the legislative history in connection with the 1932 amendments to the statute in question indicates that Congress was under the impression that the phrase "for any period not ending before his death" in the joint resolution applied only to those trusts in which the decedent survived the primary life tenant and became entitled to income during his life; and that, with the intention of taxing such trusts where the decedent died first, Congress inserted in the statute the phrase taxing income interests retained "for any period not ascertainable without reference to his death". However, the Court held that this statement of intention was not controlling as it would not be assumed that Congress intended to narrow the broader interpretation of the joint resolution. The petitioner does not suggest that Congress in 1932 intended to narrow the joint resolution. The petitioner does contend that the clear and explicit statements of Congress in 1932 are both relevant and conclusive in the interpretation of the joint resolution passed the year before.

It has long been settled that "if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former

statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman* (1845) 3 How. (U.S.) 556, 564. To the same effect see *Great Northern Ry. Co.* v. *U. S.* (1942) 315 U. S. 262; *F.H.A* v. *The Darlington, Inc.* (1958) 358 U.S. 84, 90.

In considering the Congressional statements relating to the 1932 amendments, it should be recalled that most of the members of the Congress which adopted those Committee reports had participated in the enactment of the joint resolution a year earlier and therefore knew what had been intended. Also there had been no substantial change meanwhile in the membership of the House Committee on Ways and Means and the Senate Committee on Finance. (See 71 Congressional Record pages 47-48 and 246, for the members in the 71st Congress which convened on April 1, 1929, and 75 Congressional Record pages 13, 255, and 440, for the members in the 72nd Congress which convened on December 1, 1931). Further, Ogden Mills, who had proposed the joint resolution in 1931 was Under Secretary of the Treasury in 1932, and it is a reasonable surmise that the Treasury Department proposed the 1932 amendments. All those officials certainly knew what they had accomplished in 1931.

Yet in 1932 Congress approved the Committee reports which explicitly stated that the phrase "for any period which does not in fact end before his death" which they had substituted as a "clarifying change" for the phrase "for any period not ending before his death" covered a "transfer where decedent * * * is to have the income from and after the death

of another person until his own death *and such other person predeceases him*" (Italics supplied). The italicized words were unnecessary if the phrase also covered such a transfer where the decedent dies first. In addition, the Committee reports state that the new phrase "for any period not ascertainable without reference to his death" is being inserted in the 1932 Act as "new matter"; and this new phrase has been defined by the Commissioner in his Regulations (pp. 5 and 19) and also by a Congressional Committee (p. 25) as applicable to such a transfer *where the decedent dies first*. Congress surely did not needlessly amend the statute in 1932 to cover a situation already embraced in the statute of 1931. "Thus it is presumed that the provisions added by amendment were not included in the original act" and "It cannot be presumed that the legislature would do a futile thing." Sutherland, *Statutes and Statutory Constructions* (3rd Edition by Horack) §§ 1930 and 4510.

There is not one word in the contemporary legislative history of 1931 and 1932 indicating that the joint resolution was intended to tax a reservation of income after the death of another person who in fact survived the decedent. It was suggested at the time that the resolution did not include such an interest. Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax*, 32 Columbia Law Review 1332 at 1352 (1932).

There are additional facts in connection with the legislative history of the statute which the Court below did not mention in its opinion but which have an obvious bearing on the question presented. In view

of the fact that the Treasury Department drafted the joint resolution, it is important to determine what interests the Department itself considered to be included within the resolution. As stated above, the Department in 1934 made its first interpretation of the part of the resolution with which we are concerned. It then held in E.T. 5 that "where the transferor's contingent right to the trust income was obliterated by his death prior to that of the life tenant, the transfer is not taxable". By his subsequent ruling in 1938 in T.D. 4868 quoted above (pages 20-21) he changed his Regulations to provide that if a decedent reserved only an income interest "for any period not ascertainable without reference to his death", the transfer was taxable only if made after June 6, 1932, and specified that the quoted words included "a reservation of a life estate following a precedent estate for life or a term of years". Similar provisions have been included in all the regulations since that time; and in 1951 to make his meaning doubly certain the Commissioner added the statement that "if such other person predeceased the decedent, the reservation may be considered to be for the decedent's life or for such a period as to evidence his intention that it should extend at least for the duration of his life" (p. 6).

In *Hassett* v. *Welch* this Court said with respect to another feature of the joint resolution:

> "Bearing in mind that the Resolution was prepared and its passage recommended by the Treasury, the administrative interpretation supports in uncommon measure the view that it was not intended to operate upon transfers completed prior to its passage".

Under the circumstances that same statement would apply to the question whether the statute was intended to operate upon transfers of contingent life estates.

The Court below also ignored in its opinion the fact that, after the Treasury rulings mentioned, Congress in 1939 incorporated Section 803 of the Revenue Act into Section 811 of the Internal Revenue Code of 1939 without change. As this Court also said in *Hassett* v. *Welsh* of the similar situation there involved:

> "Moreover, the reenactment of the resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative construction of the provision it reenacted."

The discussions in Congress and the Congressional reports in connection with the enactment of the Technical Changes Act of 1949 again confirm the fact that Congress was of the opinion that a trust of the kind under discussion created between March 3, 1931 and June 7, 1932 was not includible in a decedent's taxable estate. For the purpose of removing certain inequities and hardships which had come about as a result of the decision in the *Church* case, Congress inserted in the statute the paragraph continuing the exemption of such trusts. The Court below in its opinion said that it is not clear from the 1949 legislative history that Congress intended that a transfer with the retention of such a contingent life interest should not be taxed if made during that period. The Court properly recognized that the Congressional reports approved by Congress said that such an interest was included within the phrase "for a period not ascer-

tainable without reference to his death" which were not in the statute until June 6, 1932. However, the Court erroneously concluded that such statement fell short of evidencing Congressional understanding that such an interest is not also covered by the phrase "for any period not ending before his death".

That conclusion of the Court below ignores the statement by Congress in the Committee reports of 1932 as to the different scope of the two phrases. That conclusion also ignores the fact that promptly after the enactment of the Technical Changes Act of 1949, the Commissioner by T.D. 5834, 1951-1 C.B. 72, amended Regulations 105 to conform to the Act, and in Section 81.18 specified that the phrase "for any period not ascertainable without reference to his death" included a transfer of the kind under discussion where the other person survives the decedent and that if the other person dies before the decedent, the reservation could be considered to be embraced within one of the other two statutory phrases. Also, the same statements are now included in Section 20.-2036-1(b)(ii) of the Regulations under the Internal Revenue Code of 1954 (T.D. 6296, 1958-2 C.B. 433, 499-500).

The text writers are in agreement that the provision under discussion inserted in the statute by the Technical Changes Act of 1949 was intended to apply and does apply to a trust where the decedent reserved the income after the death of another person who survived him. In an article entitled "*Transfers in Trust under the New Estate Tax Law*", 3 American University Tax Institute Lectures, page 125, 137 (1949)

James B. Lewis, who was then attorney in the office of the Tax Legislative Counsel of the Treasury Department, after reviewing the history of the statute, said:

> "The legislative history indicates that the trusts created in this interval which thus escape are, primarily at least, those in which the grantor's reservation was of (a) a power over trust income not exercisable except with the concurrence of another person or persons or (b) a contingent right to receive or control the trust income (e.g., the right to receive the trust income after the death of another person who in fact survived the grantor)."

See also

Rabkin & Johnson, *Federal Income, Gift & Estate Taxation*, at Section 56.07;

The Church and Spiegel Decisions and the Technical Changes Act of 1949, by Charles Looker, 8th New York University Institute on Federal Taxation, page 366, at page 374 (1950);

Fownes and Kramer, *Federal Estate and Gift Taxes*, pages 134-5.

LAST POINT

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit, and that the duly certified copy of the transcript of the proceedings below and the printed ap-

pendix which accompany this petition shall be treated as though filed in response to the aforesaid writ to the end that this case may be reviewed and determined by this Court; that the judgment and decision of the Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may be proper.

Dated, February 9, 1962.

Respectfully submitted.

SIDNEY W. DAVIDSON
Counsel for Petitioner

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New York 5, N. Y.

APPENDIX I

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of January one thousand nine hundred and sixty-two.

Present: HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

Estate of LENA R. ABLES, UNITED TRUST COMPANY OF NEW YORK and GEORGE ABLES,
Respondents.

Appeals from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

A. DANIEL FUSARO
Clerk